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No. 06-1195

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

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Pursuant to Rule 44.2, Lakhdar Boumediene, Mohammed Nechla, Hadj Boudella, Belkacem Bensayah, Mustafa Ait Idir, and Saber Lahmar (collectively "Petitioners") respectfully petition for rehearing of the Court's order denying certiorari in this case. By separate motion accompanying this petition, Petitioners further request that the Court defer consideration of this petition pending resolution of proceedings in the court of appeals under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (DTA).

GROUNDS FOR REHEARING

This petition, coupled with a grant of the accompanying motion for deferred consideration, will preserve the best vehicle for review of the unquestionably "important" questions presented by the court of appeals' ruling in this case. 127 S. Ct. 1478 (2007) (statement of Stevens & Kennedy, JJ., respecting denial of certiorari). Other options for reviewing these questions would carry needless complications not present here, where Petitioners have fully briefed, and the lower courts have decided, the key issues pertaining to the constitutionality of the Military Commissions Act and the substantive relief available to Guantanamo prisoners on habeas. And it would be a substantial waste of judicial resources—as well as a profound deprivation of Petitioners' right to speedy habeas review of executive detention that has already lasted more than five years—to force Petitioners to re-file an original habeas action in the district court and once again pursue every issue that has already been exhaustively litigated in this case. The balance of hardships weighs decisively in Petitioners' favor: deferring the rehearing petition will cause no cognizable prejudice to the government, whereas terminating this Court's involvement with the case is likely to strip Petitioners of their ability to communicate meaningfully with counsel, as well as result in the destruction of critical classified materials that are essential to Petitioners' pursuit of relief.

The scope of DTA review and the relief available to Petitioners will be clarified by decisions in the court of appeals that Petitioners expect will be issued over the course of the

next Term. Those decisions are highly likely to remove any obstacle to a grant of certiorari to review the questions raised in their petition. In order to preserve the best vehicle for the ultimate review of those questions, Petitioners respectfully request that the Court defer consideration of this petition for rehearing until such time as the court of appeals determines whether the DTA affords Petitioners any meaningful remedy. Petitioners are conscious that this is an exceptional request, but the circumstances of this case are genuinely exceptional and make the exercise of the available procedure of rehearing appropriate.

I. THE COURT SHOULD GRANT REHEARING AT THE APPROPRIATE TIME IN LIGHT OF ONGOING EFFORTS TO SEEK RELIEF UNDER THE DETAINEE TREATMENT ACT

Petitions for rehearing of an order denying certiorari are generally granted in two instances: if a petitioner can demonstrate "intervening circumstances of a substantial or controlling effect"; or if a petitioner raises "other substantial grounds not previously presented." R. 44.2. Petitioners will soon be within both categories: the pursuit of DTA remedies in the coming months by Petitioners and other detainees constitutes an "intervening circumstance[] of a substantial or controlling effect" and will also give rise to "other substantial grounds not previously presented."

A. Petitioners Are Exhausting The Relief Available To Them Under The Detainee Treatment Act

Each petitioner has been classified as an "enemy combatant" by a "Combatant Status Review Tribunal" (CSRT). Section 1005(e)(2) of the DTA allows Petitioners to challenge "the validity of any final decision of a Combatant Status Review Tribunal" before the United States Court of Appeals for the District of Columbia Circuit. In their statement regarding the denial of certiorari, Justices Stevens and Kennedy emphasized this Court's "practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus." 127 S. Ct. at 1478. In response to the concern expressed by

Justices Stevens and Kennedy, Petitioners' counsel are assiduously preparing petitions under Section 1005(e)(2) of the DTA. Petitioners expect to press their DTA claims vigorously in pursuit of an expeditious resolution.

B. The Inadequacy Of DTA Review Is Likely To Be Demonstrated In The Very Near Future

The court of appeals will soon be prepared to rule on two critical issues relating to the adequacy of DTA review: the scope of review applied to the substantive claims of DTA petitions and the extent of factual discovery available to DTA petitioners. Both issues have been fully briefed in the court of appeals, with argument scheduled for May 15, 2007. *Parhat* v. *Gates*, No. 06-1397, and *Bismullah* v. *Gates*, No. 06-1197. The rulings in *Parhat* and *Bismullah* will bind future panels in the court of appeals that review any new or pending DTA petition.[1]

In a brief filed in *Bismullah* and *Parhat* after the Court denied certiorari in this case, the government has set forth its vision of the limited scope of DTA review proceedings. The government asserts that the DTA prohibits access by detainees to relevant government documents outside the CSRT record, *see* Resp. Br. Addressing Pending Prelim. Mots. 49-68, *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir. Apr. 9, 2007); imposes "the strongest sort of presumption of regularity" with respect to the compilation of the record, *id.* at 67; prohibits detainees from supplementing the CSRT record with evidence of innocence, evidence that statements against them were obtained through torture, or other evidence rebutting the government's accusations, *id.* at 51-66; and precludes the court of appeals from conducting inde-

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[1] *See* Order 3, *Paracha* v. *Bush*, No. 05-5194 (D.C. Cir. Apr. 9, 2007) (instructing parties to "take into account the court's disposition of [*Bismullah* and *Parhat*] in addressing issues related to discovery and this court's scope of review"); *see also LaShawn* v. *Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) ("One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court.").

pendent fact-finding, *id.* at 57-58. The government also argues that DTA petitioners should be limited to no more than *three total visits* with counsel once their representation has been authorized, *see id.* at 46-47, and that the government should be able to prohibit even security-cleared counsel from reviewing any classified information in the CSRT records unless the government (in its unilateral discretion) decides that the "need-to-know" standard is satisfied, *see id.* at 42-43. And contrary to representations made to the court of appeals during the argument of the instant case, the government now asserts that the only remedy available to Petitioners under the DTA—even if they successfully challenge the CSRT results—is a remand for further consideration before a new CSRT. *See id.* at 62-64.

If the court of appeals adopts these DTA procedures, or anything like them, it will render Section 1005(e)(2) a facially inadequate remedy serving only to delay Petitioners' ability to meaningfully challenge their detention. Such a ruling would eliminate any procedural barrier to the Court's grant of certiorari in this case, as there is no requirement that Petitioners exhaust inadequate remedies. *See* 127 S. Ct. at 1478 (statement of Stevens & Kennedy, JJ., respecting denial of certiorari) (citing *Marino* v. *Ragen*, 332 U.S. 561, 570 n.12 (1947) (Rutledge, J., concurring).

Even if the court of appeals does not accept all of the government's interpretations at the first stage of DTA proceedings, it is highly likely that some combination of substantive and procedural restrictions will prevent Petitioners from obtaining under the DTA the ultimate remedy of release available to them on habeas. Such a result would also satisfy the "precondition to accepting jurisdiction over applications for the writ of habeas corpus." 127 S. Ct. at 1478 (statement of Stevens & Kennedy, JJ., respecting denial of certiorari).

II. THE COURT'S CONSIDERATION OF THIS PETITION SHOULD BE DEFERRED IN ORDER TO ENABLE PETITIONERS TO EXHAUST THEIR REMEDIES UNDER THE DTA

Petitioners are separately filing a motion for deferred consideration of this petition for rehearing until they have exhausted their remedies under DTA § 1005(e)(2) or until those remedies have proven inadequate. Deferral of rehearing in this case would accord with established practice in both this Court and the federal courts of appeals and would permit this Court to preserve the optimal vehicle for speedy review of the underlying issues. Deferred consideration would cause no cognizable prejudice to the government, whereas terminating this Court's involvement with the case would cause irreparable harm to Petitioners.

A. Deferral Of This Petition Accords With The Practice Of Both This Court And The Courts Of Appeals, By Allowing Time For The Court To Evaluate Its Prior Decision In Light Of The Forthcoming Results Of Ancillary Proceedings

The right to petition for rehearing of an order denying certiorari "is not to be deemed an empty formality as though such petitions will as a matter of course be denied. . . . Accordingly, on an appropriate showing that a substantial matter . . . is to be presented, appropriate opportunity should be given for doing so." *Flynn* v. *United States*, 75 S. Ct. 285, 286 (1955) (Frankfurter, J., in chambers). Relying on this principle, the Court has not hesitated to postpone reconsideration of orders denying certiorari where deferral advances the interests of justice and judicial efficiency. *See United States* v. *Ohio Power Co.*, 351 U.S. 980 (1956) ("continu[ing]" petition for rehearing until the following Term); *see also United States* v. *Ohio Power Co.*, 353 U.S. 98, 99 (1957) (explaining deferral of rehearing petition on ground that "[w]e have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules"); *Vail Mfg. Co.* v. *NLRB*, 68 S. Ct. 32 (1947) (deferring consideration of petition for rehearing of order denying certiorari); *cf. Murray* v.

City of New York, 308 U.S. 528, 60 S. Ct. 606, 310 U.S. 610, 311 U.S. 720 (1940) (deferring consideration of petition for certiorari for nine months on petitioner's motions).

This Court and courts of appeals have deferred resolution of petitions for rehearing where a decision in pending state court proceedings could alter the analysis—precisely as the DTA proceedings could do here. *See* Stern & Gressman, *Supreme Court Practice* 311 (8th ed. 2002) (discussing deferral of petitions for certiorari "until an imminent state court decision is rendered on a controlling issue of state law"); *Rumsey Indian Rancheria of Wintun Indians* v. *Wilson*, 99 F.3d 321, 322 (9th Cir. 1996); *cf. Bakery & Pastry Drivers & Helpers Local 802* v. *Wohl*, 315 U.S. 769, 773 (1942) (granting petition for rehearing on the ground of an intervening decision from a state court). Similarly, the courts of appeals have deferred consideration of petitions for rehearing in cases where this Court has committed to resolve a potentially determinative legal question—precisely as the court of appeals is committed by statute to do here.[2] In fact, the courts of appeals even grant petitions for deferral in highly contingent cases where this Court is merely *considering* whether to grant a petition for certiorari in a case that might present similar legal questions. *Barrera-Leyva* v. *INS*, 653 F.2d 379, 380 (9th Cir. 1981); *Davis* v. *Roadway Express, Inc.*, 621 F.2d 775, 776 (5th Cir. 1980).

B. Deferring Consideration Of This Petition Will Secure The Optimal Vehicle For Consideration Of The Important Issues Presented

In the likely event that the DTA procedures prove inadequate, or that Petitioners exhaust their DTA remedies

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[2] *See United States* v. *Plancarte-Alvarez*, 449 F.3d 1059, 1059 (9th Cir. 2006); *United States* v. *Uchimura*, 125 F.3d 1282, 1283 n.2 (9th Cir. 1997); *United States* v. *Sorenson*, 914 F.2d 173, 174 (9th Cir. 1990); *Atchison, Topeka, & Santa Fe Ry. Co.* v. *Board of Equalization*, 828 F.2d 9, 10 (9th Cir. 1987); *Souife* v. *First Nat'l Bank of Commerce*, 653 F.2d 142, 143 (5th Cir. 1981); *United States* v. *Caldwell*, 543 F.2d 1333, 1368 (D.C. Cir. 1975); *ACLU* v. *Laird*, 463 F.2d 499, 502 (7th Cir. 1972).

without meaningful relief, deferral of the rehearing petition will enable this Court to review the "obvious[ly] importan[t]" questions raised here in the most direct and efficient manner. 127 S. Ct. at 1478 (statement of Stevens & Kennedy, JJ., respecting denial of certiorari). The substantive issues of habeas corpus review and the Suspension Clause have been fully aired below by the present counsel, the district court, and the court of appeals; a lengthy series of briefs, opinions, and orders are in the record for the Court's review; and this Court would be directly reviewing the operative court of appeals decision that provided the rule of decision disposing of Petitioners' case (and, effectively, of all habeas petitions filed by Guantanamo prisoners). Deferral of the present petition would enable review of the key legal issues in a straightforward posture, with representation by counsel who have litigated the constitutionality of the Military Commissions Act and the proper scope of habeas review recently and at great length in the lower courts.

The benefits of the uncomplicated present vehicle are especially clear given the potential uncertainty surrounding the availability of certiorari from an adverse DTA decision. Petitioners expect the government to contend that this Court does not have jurisdiction to review a decision by the court of appeals in a DTA case, *see* DTA § 1005(e)(2)(A), that habeas claims may not be joined to a petition for Section 1005(e)(2) review, and that this Court should not review a petition for habeas relief combined with a DTA petition. There is no reason to add such procedural complications to the fundamental substantive issues defining the effect of the Suspension Clause and the ability of Guantanamo prisoners to challenge their indefinite detention without due process, given that the present case poses those questions squarely.

A host of similar complications would arise if Petitioners were forced to file an original writ for habeas corpus before this Court under 28 U.S.C. § 2241, an oft-denied procedural vehicle with which the Court has effectively no modern experience. *See* D. Wilkes, *Federal Postconviction Remedies Handbook* § 3:51 (2006) ("[T]he Supreme Court has exer-

cised [its power to issue an original writ] only three times since 1900, the last occasion being in 1925."). And requiring Petitioners to launch into yet another round of fresh litigation by filing a new habeas petition in the district court (following exhaustion of their DTA remedies) would very substantially impair their right to speedy habeas relief, which has already been denied them since *Rasul*. *See* Section II.C, *infra*.

C. Deferred Consideration Of This Petition Is Essential To Preserve Petitioners' Right To Speedy Resolution Of Their Habeas Claims

The central purpose of habeas corpus is "to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person." *Carafas* v. *LaVallee*, 391 U.S. 234, 238 (1968).[3] Justices Stevens and Kennedy thus noted that "unreasonabl[e] delay[]" in the DTA proceedings would prompt "alternative means" of reviewing Petitioners' detention in order to safeguard "'the office and purposes of the writ of habeas corpus.'" 127 S. Ct. at 1478 (statement of Stevens & Kennedy, JJ., respecting denial of certiorari) (quoting *Padilla* v. *Hanft*, 547 U.S. 1062, 1064 (2006) (Kennedy, J., concurring in denial of certiorari)).

Petitioners have been repeatedly denied anything approximating speedy review of their habeas claims. If DTA review proves to be inadequate or otherwise ineffective, immediate rehearing of this petition for certiorari will provide by far the speediest vindication of the Great Writ's historic office. All certiorari briefing on the substantive questions presented in this case has already been completed. The only supplemental briefing required would be a focused

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[3] *See also Preiser* v. *Rodriguez*, 411 U.S. 475, 494 (1973) ("[S]peedy review of [a prisoner's] grievance . . . is so often essential to any effective redress."); R.J. Sharpe, *The Law of Habeas Corpus* 19 (2d ed. 1989) (noting that the Habeas Corpus Act of 1679 was designed to ensure that "judges would come to a speedy determination"); *cf. Felker* v. *Turpin*, 517 U.S. 1182, 518 U.S. 651 (1996) (expedited briefing and oral argument).

and limited exchange on the exhaustion of DTA review and whether it was adequate to remedy Petitioners' grievances.

Every other route to review in this court—in any of the currently pending Guantanamo cases—would impose substantial procedural barriers and an extended time frame before *any* Guantanamo prisoner could expect final resolution of his claims. Particularly given the history of this litigation and of Petitioners' repeatedly frustrated efforts to put their substantive claims before the court, deferred consideration is appropriate to secure the speedy vindication of Petitioners' habeas rights—and of all Guantanamo prisoners' habeas rights—in the likely event that DTA review is unavailing.

D. Deferred Consideration Is Needed To Preserve Petitioners' Ability To Communicate With Counsel And Secure Access To Critical Habeas Materials That Will Otherwise Be Destroyed

When this Court denied certiorari in this matter, the government took immediate steps to cut off Petitioners' access to their counsel. The government's position is that counsel may only communicate with Petitioners if Petitioners submit to the draconian restrictions discussed above, *see supra* p. 4; *see also* Resp. Mot. to Dismiss 9-10, *Hicks* v. *Bush*, No. 02-0299 (D.C. Cir. Apr. 19, 2007). Requiring Petitioners to accept severe limitations on counsel access, instead of the reasonable and appropriate protective order entered by the district court, would impose on Petitioners precisely the type of "unreasonabl[e] delay[]" that would interfere with Petitioners' ability to seek relief under the DTA or on habeas. Granting the relief requested would reduce the likelihood that the Court would be called upon to use "alternative means" to safeguard "the office and purposes of the writ of habeas corpus," 127 S. Ct. at 1478 (statement of Stevens & Kennedy, JJ., respecting denial of certiorari) (internal quotation marks omitted), and would preserve a critical aspect of the status quo in these cases.

Allowing the case to terminate would have a second pernicious effect on Petitioners' position: mandating the destruction of "[a]ll documents containing classified informa-

tion prepared, possessed or maintained by, or provided to, petitioners' counsel." Protective Order & Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba 10-11, *In re Guantanamo Detainee Cases*, No. 02-0299 (D.D.C., Nov. 5, 2004). The Protective Order provides that "[u]pon final resolution of these cases, including all appeals, all such documents shall be destroyed by the Court Security Officer." *Id.* at 11. Destruction of those documents would grievously impair "the office and purposes of the writ of habeas corpus" and Petitioners' ability to present their case on habeas or under the DTA.

E. Respondents Will Suffer No Cognizable Prejudice From Deferred Consideration Of The Petition For Rehearing

Respondents would suffer no cognizable prejudice if the Court deferred its consideration of the petition for rehearing in this case. Deferral would not interfere with the review contemplated by the DTA itself, since exhausting that relief would be the explicit purpose for which the Court's deferral was granted. Nor would it require release of Petitioners or any other detainees in Guantanamo Bay. At most, deferral will require the government to operate knowing that this Court may review the questions presented in this case with alacrity once DTA proceedings are resolved, an outcome that does not support any legitimate claim of prejudice.

CONCLUSION

The Court should defer consideration of this petition for rehearing pending resolution of DTA proceedings in the court of appeals, at which point the petition for rehearing should be granted.

Respectfully submitted.

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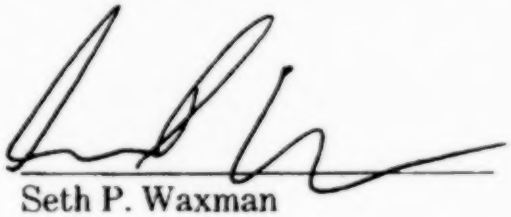
APRIL 2007

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.



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